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Don Foster v. Elmo J. Steed, An Individual, Gordon G. Wheeler, An Individual Elmo J. Steed and Gordon G. Wheeler Dba S & W Texaco Service, A Partnership and Texaco, Inc., A Corporation and Texaco, Inc. A Corporation : Appellant's Reply Brief

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

DON FOSTER,
Plaintiff and Respondent

vs.

ELMO J. STEED, an individual,
GORDON G. WHEELER, an individual,
ELMO J. STEED and GORDON G.
WHEELER dba S & W TEXACO SERVICE,
a partnership, and TEXACO, INC.,
a corporation,
Defendants,

TEXACO, INC., a corporation,
Defendant and Appellant.

No.
10[illegible]

APPELLANT'S REPLY BRIEF

Appeal from the Order of the Third District Court
for Salt Lake County
Hon. Bryant H. Croft, Judge

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AUTHORITIES CITED

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APPELLANT'S REPLY BRIEF

Appellant, Texaco Inc. (Texaco) files this reply to demonstrate that the undisputed facts relied upon by Respondent in his brief clearly support Texaco's position that Steed and Wheeler, d/b/a S & W Texaco Service, are independent contractors. In addition, Texaco will show that the cases cited in the Respondent's brief are inapplicable to the factual situation of this case and do not support his contentions.

POINT I

BASED ON THE UNDISPUTED FACTS RECITED BY RESPONDENT, THE APPELLANT, TEXACO IS ENTITLED TO SUMMARY JUDGMENT

Although Respondent sets for the the facts "in a light most favorable to the trial court's judgment" (Brief, page 3), in any light the undisputed facts clearly show that Steed and Wheeler are independent contractors in the operation and conduct of their business the S & W Texaco Service. Respondent's brief demonstrates that Texaco neither exercised direct nor indirect control of the day-by-day business and operation of S & W Texaco Service.[1] Respondent's brief, does not point out a single instance where Texaco required Steed and Wheeler to operate S & W Texaco Service in any particular manner. To the contrary, Respondent's factual statement carefully uses the term "encourage" when describing the approach of Texaco's representatives to Steed and Wheeler. Respondent further states that Texaco's employees " 'tried to sell' the operator on meeting Texaco's standards . . ." (Brief, page 7) Indeed, if Steed and Wheeler are Texaco's agents in the operation of S & W Texaco Service, Texaco did not have to "try to sell" its standards. Instead of showing control of the business operation, Respondent's factual statement shows that Steed and Wheeler

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[1]Respondent asserts at page 7 of his brief that "Wheeler and Steed could not sell products purchased from others under Texaco's trademark, nor mixed or co-mingled products [and that] the only pumps and signs at the station were marked Texaco." These unexplained assertions might be misleading. There is no provision in either the lease or the agreement of sale with Wheeler (R. 51-52) prohibiting or limiting the lessee's right to sell products from other manufacturers, refiners or third parties in any manner. In fact, the record shows that Steed and Wheeler sold products manufactured by third parties.

are fully independent in the conduct and operation of their partnership business.

Significantly, Respondent does not advance any facts showing that the relationship between Texaco and Steed and Wheeler is not controlled by the lease and agreement of sale. It is undisputed that the entire relationship between Texaco and Steed and Wheeler at the time of the accident was governed by a lease and agreement of sale with Wheeler dated May 28, 1962 and June, 1, 1962, respectively. (R.51-52)[2]

Under the lease, Texaco leased the premises "together with buildings, improvements, fixtures, equipment and facilities owned or leased by lessor" for a definite term at a stipulated rental. The agreement of sale merely provides the maximum amount of products Texaco is required to deliver in a year, the points of delivery, applicable discounts and the terms of payment. Neither the lease nor the agreement of sale specify the method, manner or details of the operation and the management of the leased premises. Under both contracts, the lessee has the exclusive responsibility for operation and management. The contracts do not contain any provision setting the resale prices of the products purchased by the lessee, nor do they specify an amount of product which must be sold. Title to all products sold and purchased under the sales agreement passes directly to the purchaser and the sales agreement does not contain any limitation on the resale terms. Neither contract requires any particular hours of operation of the leased premises and the contracts

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[2]Respondent concedes "*All documents evidencing the relationship of the parties* were prepared by Texaco on standard forms." (Brief, p. 14) [Emphasis added]

do not prohibit the sale of products manufactured or distributed by other suppliers. They contain no provisions for the inspection of the business records of the lessee, nor is there any requirement that the lessee devote his full time to the operation of the station and accept no outside work. In addition, there is no requirement that the lessee wear any particular uniform and the lessee is not required to make reports of any nature concerning his business activities.

On their face, these instruments establish a landlord-tenant relationship. There are no other agreements or understandings, expressed or implied, between the parties. There is no evidence that these contracts as written do not establish the relationship of the parties or that the parties abandoned the contracts and Texaco took control of the station.

Wheeler has possession and control of the leased premises only under the May 28th lease. Significantly, the partnership operated the leased premises independently and have not only sold products manufactured by others, but have also conducted substantial other business activities on the premises without interference in any manner from Texaco.

In the operation and management of the leased service station, Wheeler purchased gasoline and other products from Texaco on a cash basis and is responsible for the storage and taxes on the products purchased. The partnership bears all of the operating costs of the business, including taxes, franchise and license fees, heat, light, telephone and water. Steed and Wheeler are free to sell their products for cash or credit at their own discretion and they are free to

set their own terms, including the extension of credit to customers of their choice. They retain all the profits and bear all of the risk of loss in their business.

Of course, there is no presumption of agency. After the extensive depositions in this case, Respondent has not shown that the relationship between Texaco and Steed and Wheeler is other than landlord-tenant. It is well settled that a landlord is not an insurer against the negligence of his tenant and that tenancy alone does not render the landlord liable for the tortious acts of his tenant. *Tryba* v. *Petcoff*, 10 Wis. 2d 308, 103 N.W.2d 14 (1960); *Sherman* v. *Texas Co.*, 340 Mass. 606, 165 N.E.2d 916 (1960); *Coe* v. *Esau*, 377 P.2d 815 (Okla. 1963); *Brittain* v. *Atlantic Refining Co.*, 126 N.J.L. 528, 19 A.2d 793 (1941); *Texas Co.* v. *Wheat*, 140 Tex. 468, 168 S.W.2d 632 (1943); *Texas Co.* v. *Grant*, 143 Tex. 145, 182 S.W.2d 996 (1944); *Reynolds* v. *Skelly Oil Co.*, 227 Iowa 163, 287 N.W. 823 (1939). Hence, Texaco is not liable for the torts of its lessee.

Essentially, Respondent contends that a fact question arises because (1) Texaco's lease required Wheeler to keep the leased premises "in a clean, safe and healthful condition" and Texaco inspected the premises; (2) a large Texaco sign was displayed on the premises; (3) Texaco made certain repairs to the leased premises; and (4) Texaco could summarily terminate Wheeler. Additionally, Respondent contends that "Texaco encouraged the operator to identify with its product" and received marketing assistance. (Brief, page 14)[3]

[3]Respondent also points out that there were no articles of partnership between Steed and Wheeler and also that they had failed to file a statement of doing business under a fictitious name. (Brief, page 14) If these facts have significance, they show that Texaco did not concern itself with the operation and conduct of the partnership businss.

(1) An obligation to maintain the premises does not create an agency

Certainly, a lessor can require the lessee to maintain the leased premises in a specified condition without making the lessee his agent. Such a standard lease provision is prudent to protect the lessor's interest in the leased promises. Moreover, Texaco's periodic inspections and suggestions on cleanliness are consistent with Wheeler's obligations under the lease. As held in *Hudson* v. *Gulf Oil Co.*, 215 N.C. 422, 2 S.E.2d 26 (1939), Texaco is within its right as a landlord in making these inspections and giving suggestions.

(2) A sign advertising Texaco's brand products does not establish that Texaco runs the station

Although S & W Texaco Service exhibited signs and insignia bearing the Texaco registered trademarks and trade names, such displays do not alter the landlord-tenant relationship. It is well known that such signs and insignia are displayed throughout the country by independent dealers who sell Texaco branded products. Similarly, signs and insignia are also displayed by independent dealers selling petroleum products of other marketers. It is clear that these signs and emblems merely provide notice to the motoring public that a particular brand of petroleum products is available for sale at the service station. *Reynolds* v. *Skelly Oil Co.*, 227 Iowa 163, 287 N.W. 823, 827 (1939); *Coe* v. *Esau*, 377 P.2d 815 (Okla. 1963); *Sherman* v. *Texas Co.*, 340 Mass. 606, 165 N.E.2d 916 (1960).

As held by the court in the *Sherman* case (165 N.E.2d, p. 917) :

> "There was testimony that the defendant has a distinguishing color and sign scheme for gasoline stations either owned or operated so that identification on all such stations is standard. This station had a 'characteristic * * * banjo pole' displaying a round disc with the standard Texaco identification, 'a red star with green and the letters "Texaco." ' The gasoline pumps were of a standard type and color scheme, which is used for both owned and leased stations. The station had the name Texaco on its signs and the characteristic colors, white with green trim, on the building. On stations 'operated solely by * * * [the defendant]' there is a sign over the door in six inch block letters reading 'The Texas Company.' There was no such sign over the door of this station or elsewhere on the premises. The lease of a fully equipped station, including three pumps and a 'banjo pole and sign,' corroborated the inference from the open display of Texaco identification that this display was with the defendant's approval and pursuant to its design.
>
> "We rule that the representation of the signs was confined to the statement that Texaco gasoline was sold at the station. We agree with the statement in Reynolds v. Skelly Oil Co., 277 Iowa 163, 171, 287 N.W. 823, 827, that it 'is a matter of common knowledge that these trademark signs are displayed * * * by independent dealers' [Citation omitted]"

(3) Minor repairs by Texaco to the premises are consistent with its interest as a landlord

Of course, a landlord is authorized to make minor repairs to the premises with the consent of the tenant. Again,

by making such repairs, the landlord merely protects his interest in the leasehold.

(4) Texaco cannot summarily terminate its lessee under the May 28 lease

Respondent's assertion that Texaco can summarily terminate Wheeler is contrary to the May 28 lease. Under the lease, the service station was leased for a one-year period and the rights and obligations of the lessor and lessee are defined. Either party can terminate the lease "at the end of the first year or subsequent year on ten (10) days' prior written notice." The lease also provides that the lessor can terminate the lease if the lessee breaches its covenants or upon certain specified conditions. Such a termination clause is a standard provision in leases and is designed to protect the landlord's interest in the property. Certainly, Texaco cannot summarily terminate Wheeler under this provision, as Respondent asserts.

POINT II

THE CASES RELIED UPON BY RESPONDENT DO NOT SUPPORT HIS POSITION

The first case cited by the Respondent, *Gonzales* v. *Derrington*, 10 Cal.Rpts. 700 (1961), was reversed on appeal by the Supreme Court of California, 363 P.2d 1, 14 Cal.Rpts. 1 (1961). In this case three drunks who had been thrown out of a cafe secured 4½ gallons of gas in an open bucket from a Union Oil station. They took the gas and threw it onto the floor of the cafe and ignited it. Three persons were burned

to death and one other was seriously injured. The Court of Appeals in the case cited by the Respondent held that the service station attendant, by delivering gasoline in an open container in violation of a state statute, was negligent and that his negligence was a proximate cause of the deaths and injury. Union Oil was held responsible on the narrow ground that since it had retained title to gasoline it had retained control of the method of delivery. The Supreme Court of California reversed the Court of Appeals, holding that the deaths and injury were the result of an independent intervening cause and that defendant Union Oil Company's motion for a directed verdict should have been granted.

Two of the cases cited by the Respondent in his brief involve injuries which were sustained as the result of certain defects in premises owned by the defendant oil company. Accordingly, an action against the defendant oil company as owner of the premises was allowed.

The first case in this category is *Boronskis* v. *The Texas Company*, 183 N.E.2d 127 (Mass., 1962), in which the plaintiff's property was damaged as a result of a leaking gasoline storage tank. The storage tank was a permanent fixture and part of the premises owned by the defendant oil company. The defendant oil company had always authorized inspection of the storage tanks and had paid for all repairs to the storage tanks. The second case is *Edwards* v. *Gulf Oil Co.*, 69 Ga.App. 140, 24 S.E.2d 843 (1943), which involved the death of a child caused by a large depression in the sidewalk adjacent to the service station which had been filled with hot oil or tar.

In the cases of *Ryan* v. *Standard Oil Co.*, 144 S.W.2d 170, (Mo. App., 1940), and *Phillips Petroleum Co.* v. *Hooper*, 164 .2d 743 (CA 5th, 1947), also cited by the Respondent, the issue of whether or not the oil company controlled the operation of the dealer was not even discussed. In the *Ryan* case, the defendant in its answer had admitted that it controlled the operation of the dealer. The court on page 174 stated:

> "The corporate defendant in its answer affirmatively alleged that it solely and exclusively owned and operated, maintained and controlled the filling station, and that the same was not in any manner owned, operated or maintained or controlled by defendant Basye."

In the *Phillips* case, although the court found that there was sufficient evidence to submit to the jury the question of the defendant's control and ownership of the station, there was absolutely no discussion in the opinion as to what the facts were on which the relationship between the oil company and dealer was based.

In *Standard Oil Co.* v. *Gentry*, 241 Ala. 42, 1 So.2d 29, (1941), the court, in holding the defendant oil company liable to the plaintiff, based its decision on the theory of estoppel. The defendant, Standard Oil Company, for a long time prior to the accident had operated the service station. During this time the plaintiff had been a regular customer of the station. Six weeks prior to the accident Standard Oil leased the station to a lessee. The evidence indicated that there was no difference in the method or manner of operation of the service station after the station was leased in comparison to its prior operation. The court held that

plaintiff had a right to rely upon the fact that the apparent operation of the service station was still by the defendant oil company.

The remaining two cases which the Respondent cites in support of his position are clearly distinguishable upon their facts. In *Brenner* v. *Socony Vacuum Oil Co.*, 236 Mo.App. 524, 158 S.W.2d 171 (1942), the facts clearly indicated that the defendant oil company, through its agent, had given orders and instructions concerning the detail of the day to day operations of the station. Also, the dealer regularly reported to the defendant concerning lubrication and washing income, the sale of tires, tubes and specialty items.

In *Humble Oil and Refining Co.* v. *Martin*, 148 Tex. 175, 222 S.W.2d 995 (1949), the dealer Snyder was required to make reports to the Humble Oil Company and to "perform other duties in connection with the operation of the station that might be required of him from time to time by the company." Furthermore, the defendant, Humble Oil Company, paid 75 percent of the utility bill, which was one of the most important operating expenses of the dealer. The Supereme Court of Texas clearly distinguishes the facts in the *Humble Oil* case from the prior case of *The Texas Company* v. *Wheat*, 140 Tex. 468, 168 S.W.2d 632 (1943). In *The Texas Company* case the Supreme Court of Texas held that the dealer was not the employee or agent of the defendant oil company. *The Texas Company* case on its facts is very similar to the present case. The dealer paid cash for the merchandise purchased from the oil company, bore all of the expenses of operating the station, employed and controlled the employees, and stood the losses and appropriated

the profits from the operation of the station. The oil company, as a condition precedent to the leasing of the station, had the right to maintain certain standards of cleanliness in operating the station and held certain schools for the dealers with respect to the operation of the service station. Instructions were also given from time to time by company representatives on how to service cars. The Supreme Court of Texas sustained a directed verdict in favor of the defendant, The Texas Company.

CONCLUSION

For the foregoing reasons, Texaco, Inc., submits that the undisputed facts compel entry of summary judgment in its favor. The undisputed facts conclusively show that Texaco did not control or direct the operation of S & W Texaco Service. Consequently, Texaco is not liable for any alleged negligence of its lessee or its employees.

Respectfully submitted,

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